STATE OF ARIZONA

OFFICE OF ADMINISTRATIVE HEARINGS

G. F., a minor, by and through parents T. R. and S. R., Petitioners/Appellants, -v- **Scottsdale Unified School District**, Respondent/Appellee.	No. 03F-II02025-ADE **DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE**

This is a final administrative appeal brought by T. R. and S. R. ("Parent"), on behalf of G. F. ("Student"), for review of a Due Process Hearing Officer's Decision concluding that Respondent Scottsdale Unified School District ("Respondent School District") did not violate Parent's or Student's rights when Respondent School District failed to evaluate Student for eligibility under the IDEA and upholding Respondent School District's determination that Student is not eligible for special education.[1] Pursuant to Arizona Revised Statutes (A.R.S.) §§ 41-1092.01(E) and 41-1092.02, the Arizona Department of Education referred this matter to the Office of Administrative Hearings for final administrative hearing appeal as provided in Arizona Administrative Code (A.A.C.) R7-2-405(J). The law governing these proceedings is the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1487 (as re-authorized and amended in 1997), and its implementing regulations, 34 C.F.R. Part 300, as well as the Arizona Special Education ("SPED") statutes, A.R.S. §§ 15-761 through 15-772, and implementing rules, A.A.C. R7-2-401 through R7-2-406. Parent and Student were represented at the Level I Due Process Hearing by attorney Lucy Keough. Respondent School District was represented by attorney James Martin.

[1] Except for "Student" (who had been identified as "Petitioner" in the level-one proceedings), this Decision and Order will use the designations created by the Level I Hearing Officer in the "Identity Key" attached to the Hearing Officer's Decision. In addition, since T. R.'s interaction with Respondent School District was minimal and Student's mother S. R. took all actions on Parents behalf, "Parent" refers to S. R. and will be used in lieu of "Parents."

The Level I Due Process Hearing in this matter was conducted August 14, 15, and 16, 2002. Parent's request for hearing raised a number of complaints, the chief of which was that Respondent School District failed to identify and evaluate Student as eligible for special education services. The Hearing Officer's Decision was issued October 22, 2002, and determined that Respondent School District had committed no violations because Student was not eligible for special education. Parents filed a timely appeal on November 21, 2002. This Administrative Law Judge did not order briefing or additional evidence for the appeal.

The record reviewed by this Administrative Law Judge consists of the initial complaint, prehearing correspondence and orders, three volumes of hearing transcripts (approximately 700 pages), 47 exhibits admitted into evidence at the hearing, the Due Process Hearing Officer's Decision issued by Harold J. Merkow (hereinafter "Hearing Officer's Decision"), and Parent's request for appeal. Based on the records reviewed, this Administrative Law Judge makes the following Decision and Order reversing the Hearing Officer's Decision and finding both that Respondent School District violated Parent's and Student's rights under the IDEA and that Student is eligible for special education.

STANDARD OF REVIEW

This is a second-level administrative review. Both federal and state law require that the reviewing official "make an independent decision." 20 U.S.C. § 1415(g); *see also* A.A.C. R7-2-405(J)(1)(b)(i) and (v). This tribunal may exercise non-deferential review, except that deference will be given to any findings of a hearing officer based on credibility judgments. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 889 (9th Cir. 2001); *Carlisle Area School v. Scott P.*, 62 F.3d 520, 529 (3d Cir. 1995). Therefore, this tribunal is not bound by a hearing officer's factual or legal conclusions. Like the first-level hearing officer, this tribunal must determine whether Respondent School District has met all requirements of federal and state law, rules, and regulations concerning identification, evaluation, educational placement, and provision of a free appropriate public education for children with disabilities. *See* A.A.C. R7-2-405(H)(4)(a).

DECISION

I. Issues On Appeal

Because a request for appeal is not a brief or legal memorandum, it affords the opportunity to only briefly identify bases for appeal. Parent's request for appeal is generic, identifying issues such as whether the decision is supported by the evidence or legal authority, whether Respondent School District was properly allocated the burden of proof, and whether such burden was met. Nevertheless, this tribunal has reviewed the entire record, focusing on the issues identified for hearing, the substantive claims Parent made at the hearing, and the evidence offered.

There is no formal identification of the issues for hearing in this record. The Hearing Officer identified the issue in his Decision as whether Student is eligible for special education services. (Hearing Officer's Decision at 3.) A review of the record shows that issues raised by Parent and addressed by the Hearing Officer were, in general, whether Respondent School District complied with "child find" requirements, whether Respondent School District violated Parent's procedural and notice rights, and whether Student meets the legal definition of a "child with a disability." These general issues contain the following sub-issues:

1) Child Find Requirements:

    a) Did Respondent School District comply with the requirements, both federal and state, pertaining to identification and evaluation of children suspected of having a disability?
    b) If not, what is the appropriate remedy?

2) Procedural and Notice Rights:

    a) Did Respondent School District comply with the law regarding Prior Written Notice and Procedural Safeguards?
    b) If not, were the violations prejudicial or harmless?

3) Eligibility for Special Education:

    a) Does Student have one or more of the specified disabilities?
    b) If so, does Student need special education?

The record supports a determination that these issues accurately state the dispute between the parties.[2]

For the reasons stated below, this tribunal finds that Respondent School District did not comply with the requirements for identifying and evaluating children suspected of having a disability and that the violation wrongly delayed the process of evaluating Student for IDEA eligibility. This tribunal also finds that Respondent School District did not comply with the law regarding procedural and notice rights and that the violation seriously infringed Parent's opportunity to participate in the identification and evaluation process. Finally, this tribunal finds that Student has an eligible disability and needs special education.

II. Hearing Officer's Decision

The Findings of Fact stated in the Hearing Officer's Decision are found to be consistent with the greater weight of the evidence of record. The Hearing Officer's Findings of Fact are hereby adopted and incorporated into this Decision and Order. In addition, this tribunal makes new findings of fact as noted below.

The Conclusions of Law reached in the Hearing Officer's Decision, however, are not adopted, except for the following two. First, the Hearing Officer concluded that the evidence did not show that Student suffers from an emotional disability as defined in 34 C.F.R. § 300.7(c)(4) and A.R.S. § 15-761(5). (Hearing Officer's Decision at 25, Conclusions of Law ("CL") ¶ 5.) The Hearing Officer's reasoning and conclusion are found to be consistent with the evidence and are adopted and incorporated into this Decision and Order: Student does not have an eligible emotional disability. Second, the Hearing Officer concluded that "Respondent School District reasonably concluded that the independent evaluation submitted by the psychologist in May 2002, together with the supplement dated May 10, 2002, was an inappropriate evaluation for the purpose of finding [Student] eligible for special education services." (Hearing Officer's Decision at 26, CL ¶ 8.) Because this conclusion appears to be based, at least in part, on a

[2] It should be noted that, while compliance with Section 504 of the Rehabilitation Act of 1973 may have been addressed at the level-one hearing, it is not clear that Student was making a claim under that law. In any event, Student did not argue it in his post-hearing memorandum. Therefore, only the IDEA is addressed in this Decision and Order. Furthermore, whether or not Respondent School District has

credibility determination, the Hearing Officer is given deference and the conclusion is upheld. All other conclusions of the Hearing Officer are rejected.

Although the Hearing Officer's factual findings are adopted and incorporated into this Decision and Order, discussion of the contested issues necessitates that this tribunal render a statement of facts that includes a summary of the Hearing Officer's factual findings with focus on the timing of events as well as emphasis and clarification of facts found to be pertinent by this reviewing official.

III. The Facts

Student is a tenth grader who has been attending schools in Respondent School District since first grade in 1993. During his elementary school years, he was an average student. In his sixth grade year (1998-99), he was diagnosed by a pediatrician with depression, began taking anti-depressant medication, and began to struggle markedly with academics. Toward the end of the year, the school wrote to Parent expressing concern about Student's academic performance and potential for failure. Parent spoke verbally to a school counselor about having Student tested, but nothing happened. The year ended and Student passed to the seventh grade. (Hearing Officer's Decision at 3-5, Findings of Fact ("FF") ¶¶ 1 and 4.)[3]

Before the start of seventh grade, Parent attempted to get help from school staff by sending a letter about Student's medical condition. When seventh grade started, Parent began talking with the seventh grade counselor about Student. In October 1999, Parent sent another letter to the school in which she clearly requested an evaluation of Student. In response, the school started Respondent School District's Student Study Team (SST) process. Respondent School District uses this process to look at struggling students and create interventions that will improve the students' learning. The members of an SST include teachers, administrators, and parents. (Hearing Officer's Decision at 5-6, FF ¶¶ 5 and 6.)

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complied with Section 504 has no bearing on compliance with the IDEA. See *Yankton Sch. Dist. v. Schramm*, 93 F.3rd 1369, 1376 (8th Cir. 1996) (school district must comply with both statutes).

[3] At the end of each paragraph in this section, citations are given for the Hearing Officer's Findings of Fact relied on by this tribunal. While all factual findings made by the Hearing Officer are incorporated into this tribunal's Decision, not all are recited.

The SST met on October 25, 1999, and designed several interventions for Student. These included a log book for parent monitoring of Student's progress, one-on-one sessions three times a week after school with a teacher for help with homework assignments, and instruction in note-taking. An SST meeting to review the results of the interventions was set for December 8, 1999. (Hearing Officer's Decision at 6-7, FF ¶ 7.) There is no evidence showing that the need for an IDEA evaluation was discussed at the October 25, 1999 meeting. Nor was Parent informed as to when a decision about her request for evaluation would be made. Respondent School District was focused on creating interventions for Student.

The December 8, 1999, SST meeting did not take place because Parent told Respondent School District that she wanted to postpone it until Student's medications were stabilized. Student was struggling with medication regimens and was experiencing mood swings. Respondent School District honored the request and canceled the meeting. (Hearing Officer's Decision at 7, FF ¶ 8.) The SST did not meet again until November 21, 2001, almost two years later, at which time the question of evaluating Student was finally addressed.

In February 2000, Student was hospitalized for psychiatric problems. He began getting psychiatric treatment. He was diagnosed as having bipolar disorder and Attention Deficit Hyperactivity Disorder (ADHD). He was put on medications for the bipolar disorder, but he could not tolerate medications for the ADHD, so that condition was not being addressed with medications. One of the side effects of the medications he was taking, as noted by Respondent School District's teachers' notes, was excessive drowsiness in class, especially the first class of the morning. Other side effects were diminished motivation, cognitive slowing, concentration and memory problems. These side effects and the effects of his illnesses adversely affected Student's educational performance by causing excessive tardiness, sleeping in class, failing to complete homework assignments, failure to turn in assignments, inattention, lack of understanding about assignments, low test scores, and sometimes poor grades. (Hearing Officer's Decision at 3-4, 7, 10; FF ¶¶ 2, 3, 9, and 13.)

After his hospitalization in February 2000, Student continued to struggle at school. Parent provided Respondent School District with information about the hospitalization and continued seeking help from Respondent School District. During that time, Student was being taught an "adapted curriculum" in Language Arts and Humanities. (Petitioner's Exhibit 13, offered into evidence by Respondent School District.) And again, both the school counselor and the Assistant Principal contacted Parent because they were concerned with Student's poor performance and ability to progress through the curriculum. Parent spoke to the school counselor about an evaluation for Student. Instead of reviving the SST, Parent was told that if she got an evaluation at her own expense it would be faster than going through Respondent School District. (Hearing Officer's Decision at 7-8, FF ¶ 10.) Therefore, Parent paid $695.00 for an evaluation of Student that was conducted in March 2000. (Petitioner's Exhibit 30.)

The March 2000 evaluation showed that Student had average abilities, did not have a specific learning disability, but struggled with short-term (working) memory, attention problems, anxiety, and depression. The March 2000 evaluation found that these problems were having some adverse effect on Student's educational abilities but no recommendations for special education were made. Parent showed the evaluation to Respondent School District, who did nothing with it. (Hearing Officer's Decision at 8-10, FF ¶¶ 11, 12.) Still, the SST was not revived.

In April 2000, Respondent School District changed Student's placement to its alternative school for "at-risk" students. This placement change provided Student with smaller class sizes and one teacher throughout the day. Also, he had no homework. Student was the only seventh grader in his class; the other students were fourth, fifth, and sixth graders. (Hearing Officer's Decision at 11, FF ¶ 15.) He completed seventh grade at the alternative school.

Student also spent the entire eighth grade at an alternative school run by Respondent School District. This school offered Student one teacher throughout the day, ten students in the class, and no after-school homework. Also, specific changes were made for Student: he was allowed to turn in work late and to catch up on his late

work. Student continued to have many absences and tardies but received average grades and passed. He was recommended to attend ninth grade at the regular high school campus. (Hearing Officer's Decision at 11, ¶ 16.)

Before ninth grade started, Parent contacted an assistant principal to get assistance for Student, so that he would succeed. The assistant principal told Student's teacher's about his condition and asked that they observe him for a while to see what his needs were. An SST meeting was scheduled for November 21, 2001. During the nine-week observation period, the assistant principal noted that Student had difficulty getting up and getting to school on time, and had demonstrated behaviors that affected his learning, like difficulty understanding directions for assignments. (Hearing Officer's Decision at 12-13, FF ¶¶ 18, 19.) The assistant principal did not contemplate evaluating Student for special education, but intended to merely continue monitoring Student's condition and providing what Respondent School District then began characterizing as "504 accommodations," referring to Section 504 of the Rehabilitation Act of 1973.

Just before the November 21, 2001, SST meeting, Student's psychiatrist wrote a letter describing Student's medical conditions and concluding that, because of their nature and the "untreated" condition of the ADHD, Student's educational performance was being adversely affected. (Hearing Officer's Decision at 13-14, ¶ 20.) Student's psychiatrist also testified at the level-one hearing. He opined that from the documented information he had seen, which was limited, and his discussions with Student and Parent, Student's illnesses were adversely affecting his educational performance. The psychiatrist was concerned and thought that Student needed more help.

The SST met on November 21, 2001. Parent was present. The SST noted that "excessive daytime sedation" was affecting Student's performance and created a formal list of accommodations. These included extending time for completing assignments, assistance with study and organization skills and directions for projects, adjustment of long assignments into smaller segments, support for mood swings, exception to the tardiness policy, and reduction of weight to be given for homework production. Also recommended was "a referral to SST for further ed[ucational] review" for IDEA.

(Hearing Officer's Decision at 14-15, ¶¶ 21, 22.) This was the first time that Respondent School District contemplated evaluating Student for special education.

Through a telephone call in early December 2001, an SST meeting was set for January 10, 2002, to consider evaluating Student for special education. Parent was having a medical problem and voluntarily chose not to go to the meeting. Participants at the meeting were appropriate for consideration of whether to evaluate Student for special education eligibility. Based mainly on reports from Student's classroom teachers and the March 2000 evaluation, the SST declined to refer Student for evaluation but continued the ongoing accommodations. Respondent School District issued a Prior Written Notice that stated that it did not propose to initiate placement changes. (Hearing Officer's Decision at 15-17, ¶¶ 24-27.)

One week later, Student was suspended from school for a serious violation of the Student Code of Conduct. Respondent School District notified Parent that it intended to expel Student for the violation and Parent requested Due Process. Respondent School District agreed to an independent evaluation of Student and placed him at the alternative school for the interim. (Hearing Officer's Decision at 17, ¶¶ 28, 29.)

An independent evaluation was performed in April and May 2002, and on May 15, 2002, the SST met again to consider the results. The SST found the independent evaluation to be deficient and unreliable and concluded that Student was not eligible for special education because he was performing adequately in the regular classroom with accommodations. Respondent School District issued another Prior Written Notice and the issues went to the level-one hearing in August 2002. (Hearing Officer's Decision at 17-24, ¶¶ 31-38.)

As noted above, the Hearing Officer's conclusions that Student does not have an eligible emotional disability and that the May 2002 evaluation was inappropriate are confirmed and adopted for this review.

IV. The IDEA

Through the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1487 (as re-authorized and amended in 1997), Congress has sought to ensure that all children with disabilities are offered a free appropriate public education ("FAPE")

that meets their individual needs. 20 U.S.C. §1400(d); 34 C.F.R. § 300.1. These needs include academic, social, health, emotional, communicative, physical, and vocational needs. *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) (quoting H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106). A FAPE consists of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982). This is generally referred to as "special education and related services." 20 U.S.C. § 1401(8).

The IDEA mandates the identification, evaluation, and development of an IEP for each child with a disability. 20 U.S.C. §§ 1412(a)(3)(A), 1414(a)-(d). The central feature of the process is the development of the IEP. The IEP is a written statement for each disabled child that is developed by a team consisting of the parents, the child's regular classroom teacher, a special education teacher, a representative of the school district that is responsible for educating the child, and perhaps others. 20 U.S.C. § 1414(d)(1)(B). However, before the IEP-development stage is reached, a disabled child must be identified and evaluated.

The IDEA provides both substantive requirements and procedural safeguards to disabled children and their parents. The procedural safeguards granted to parents are intended to "maximize parental involvement in the education of each handicapped child." *Rowley*, 458 U.S. at 182, n.6. The IDEA strongly emphasizes these procedural safeguards, placing as much importance on them as on the specialized education that is to be developed and provided. *Id.* at 205-06; *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877 (9th Cir. 2001). In reviewing whether a FAPE has been provided, the first question is "has the State complied with the procedures set forth in the Act?" *Rowley*, 458 U.S. at 206 (footnote omitted). The second question is whether the individualized educational program (IEP) developed through the process is reasonably calculated to enable the child to receive educational benefits. *Id.* at 206-07.

While violations of procedural requirements do not necessarily mean a denial of FAPE, procedural violations that result in the loss of educational opportunity or seriously infringe the parents' opportunity to participate in the process are deemed a denial of

FAPE. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877 (9th Cir. 2001); *W.G. v. Bd. of Trustees*, 960 F.2d 1479 (9th Cir. 1992).

V. Respondent School District Did Not Comply with the Law Pertaining to Identification and Evaluation of Children Suspected of Having a Disability

An important component of the provision of FAPE is the "child find" requirement mandated by the IDEA. It states that all children with disabilities who need special education and related services must be identified and evaluated. 20 U.S.C. § 1412(a)(3). This means that any child who is *suspected* of being a child with a disability must be identified and evaluated, even if the child is advancing from grade to grade. 34 C.F.R. § 300.125(a)(2)(ii). While the federal law contains requirements for evaluating children, the method for identifying disabled children is largely left to each state.

At the time Parent first requested that Student be evaluated, the Fall of 1999, Arizona had promulgated rules implementing a process for identifying children with disabilities. Each school district was required to have written procedures for identifying children requiring special education. A.A.C. R7-2-401(C)(1) (Supp. 95-4).[4] Each child was to be "screened" by consideration of "academic, visual, hearing, communication, emotional, and psychomotor problems," but each child did not have to be comprehensively evaluated. A.A.C. R7-2-401(C)(2) (Supp. 95-4). If a "possible handicap" was indicated, either a school district employee or a parent could request a comprehensive evaluation of the child. A.A.C. R7-2-401(C)(4) (Supp. 95-4). At that point, the school district had to determine whether or not to evaluate the child. That determination was to be made within 30 calendar days. A.A.C. R7-2-401(C)(5)(a) (Supp. 95-4) If a comprehensive evaluation was denied, the school district was required to provide the parent with "written notice" that included "a description of the action proposed or refused by the [school district]; a description of any options the [school district] considered and the reasons why those options were rejected; a description of each evaluation procedure, test, record or report the [school district] used as a basis for the proposal or refusal; a description of any other factors which [sic] were

[4] Because the rules were amended in 2001, citations are to the rules as they existed in 1999 and 2000.

relevant to the [school district]'s proposal or refusal; and a full explanation of all the procedural safeguards available to the parent as stated in [federal regulation]." A.A.C. R7-2-401(C)(5)(b) (Supp. 95-4). Furthermore, the school district was required to maintain documentation of the identification procedures used and the dates of screening in the child's permanent record. A.A.C. R7-2-401(C)(6) (Supp. 95-4).[5]

If the school district determined that a comprehensive evaluation was warranted, it had to first obtain parental consent for evaluation. A.A.C. R7-2-401(C)(5)(c) (Supp. 95-4). The evaluation was to then be made by "a group of professional education evaluation specialists with expertise in areas relevant to the child's disabilities or suspected disabilities" and the results of the evaluation considered by a "multidisciplinary evaluation team" to determine eligibility for special education. A.R.S. § 15-766 (Supp. 1999);[6] *see also* A.A.C. R7-2-401(D) (Supp. 95-4). The multidisciplinary evaluation team was to include the parent. 34 C.F.R. § 300.534(a)(1); A.R.S. § 15-761(15) (Supp. 1999). Thus, the parent was to be not only timely informed of each step, but could participate in the decision-making as well.

Here, Respondent School District failed to comply with the rules for identification of children with disabilities. There is no question that Parent requested a full evaluation of Student in October 1999. Parent had asked about testing even earlier in the year. And the evidence is clear that, by the Fall of 1999, Respondent School District was aware that Student had been diagnosed with bipolar disorder and ADHD. Student was clearly a child suspected of having a disability in October 1999. *See Dep't of Ed., State of Hawaii v. Cari Rae S.*, 158 F.Supp.2d 1190, 1195 (D. Haw. 2001) (holding that the threshold for suspicion is relatively low; inquiry is not whether the student actually qualifies, but whether the student should be referred for evaluation).

In October 1999, Respondent School District set up an SST meeting, which it claims was its process for identifying children with disabilities. However, there is no indication that such was the purpose of the SST meeting. The evidence does not show

[5] Under the amended rule currently in place, screening must be completed within 45 calendar days of notification by parents of a concern regarding the child, parents must be consulted before the school district makes it decision, and if evaluation is denied the school district must give the parent Prior Written Notice and Procedural Safeguards Notice within 60 days. A.A.C. R7-2-401(D) (Supp. 02-3).

that the SST intended to determine if Student needed to be evaluated for special education. Instead, the SST focused on "interventions" as a means of perhaps postponing the evaluation process. The SST meeting did not even consider whether Student should be evaluated. Interventions were to be tried and then the results reviewed after 30 days (which turned out to be over 40 days) to see if more interventions were necessary. Thus, more than 30 days after Parent's request, Respondent School District had not made a decision about evaluation, and did not appear to even be considering it. In fact, its failure to consider evaluation was tantamount to a denial of evaluation.

Parent then requested postponement of the SST process for "medication stabilization" and the SST process halted. Several more months went by and when Parent brought up the topic of evaluation again she was told that she should go get her own because it would take too long to go through Respondent School District. (Hearing Officer's Decision at 7, ¶ 10.) Parent obtained her own evaluation at her own expense. Respondent School District did not revive the SST to make a decision about Parent's request for evaluation even though Parent clearly was interested in obtaining one. The IDEA puts the onus on school officials, not the parents, to insure complinance.

Many more months passed and as Student was entering the ninth grade in 2001 Parent again raised the issue of Student's suspected disabilities, this time to the high school assistant principal. The assistant principal was a bit more responsive to Parent's request, but took almost the whole first semester before reviving the SST in late November 2001. At that meeting Respondent School District still did not make a determination about whether to evaluate Student, but made only a *referral* to another SST meeting to consider evaluation. That occurred in January 2002, where a decision was finally made regarding Parent's request for evaluation that had been initially made in October 1999.

The facts show that Respondent School District failed to comply with the process and timeframes for identifying Student as a child with a suspected disability and making a timely decision concerning whether or not to evaluate him. The violation seriously

[6] Again, the statutes have since been amended. Where indicated, citations are to the statutes in place at

infringed Parent's opportunity to participate in the process, because it inordinately delayed it, and resulted in a denial of FAPE.

VI. Respondent School District Violated Student's and Parent's Procedural Rights

In addition to substantive requirements, procedural safeguards are mandated to ensure the provision of FAPE. Crucial to this is the informed participation of the parents in the decision-making process. To ensure that parents of disabled children are well-informed about the identification and evaluation process, which is complicated, the law requires that school districts give certain written information to parents.

Whenever a school district proposes or refuses to initiate the identification, evaluation, or educational placement of a child with a disability or suspected of having a disability, it must provide "prior written notice" as described in the statute. 20 U.S.C. § 1415(b)(3) and (c). The notice must contain information about the action proposed or refused, the reasons for the refusal, other options that were considered, the documentation used to make the determination, other relevant information, a statement about the parents' procedural safeguards, and sources for assistance in understanding the IDEA. 20 U.S.C. § 1415(c); *see also* A.R.S. § 15-761(27). In addition, parents must be given a "procedural safeguards" notice that contains information about parents' rights during the identification, evaluation, and IEP process. 20 U.S.C. § 1415(d); see also A.A.C. R7-2-401(H).

The record shows that Parent was not given the required notices until January 2002, much too late. Because Respondent School District wrongly delayed its determination about evaluation of Student, Parent was never properly informed that Respondent School District was refusing to evaluate Student and was never informed about her rights to challenge that refusal. Even though Parent requested that the process be postponed in December 1999, Respondent School District was required to make a determination and inform Parent of her rights. Then, when Parent inquired about evaluations in February-March of 2000 and Respondent School District did nothing, a refusal to evaluate occurred and Parent should have been given the proper notices. Had Parent been given proper notice, Parent would have known of her right to

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the time of Parent's request for evaluation, Fall 1999.

"present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child. . . ," and her right to request a due process hearing to resolve such complaints. 20 U.S.C. § 1415(b)(6) and (f).

The facts show that Respondent School District failed to comply with the requirements for notifying Parent about her rights and the identification and evaluation process. The violation seriously infringed Parent's opportunity to participate in the process and resulted in a denial of FAPE. "Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA." *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001).

VII. Student Has an Eligible Disability and Needs Special Education

Students eligible under the IDEA are those who have one or more of the statutorily-specified disabilities and who need special education. 20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.7(a); A.R.S. § 15-761(2) and (4). School districts are required to give such students "access to specialized instruction and related services which [sic] are individually designed to provide educational benefit to the [student]." *Rowley*, 458 U.S. at 201. The evidence shows that Student qualifies for special education.

A. Student Qualifies as "Other Health Impaired"

As the Hearing Officer found, there is no dispute that Student is a student with a disability. (Hearing Officer's Decision at 27.) Respondent School District has never challenged the diagnoses of bipolar disorder and ADHD. Those diagnoses meet the definition of the disability category "other health impairments" if they adversely affect Student's educational performance. 34 C.F.R. § 300.7(c)(9); A.R.S. § 15-761(20). Again, there is no question that Student's diagnoses adversely affect his educational performance. This is clear from the testimony given by Student's treating psychiatrist and from the evidence showing Student's long struggle with schoolwork, including his elevated number of absences and tardies, his inability to do homework, and "excessive daytime sedation." Respondent School District seems to think that it can keep Student's medical conditions from adversely affecting his educational performance by

implementing Section 504 accommodations. However, the 504 accommodations only mitigate the adverse effects of Student's conditions, they do not nullify the adverse effects. Student's conditions adversely affect his educational performance; therefore, he has a qualifying disability.

B. Student Has Been Receiving Specially Designed Instruction for Some Time

Special education is "specially designed instruction . . . to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings. . . ." 20 U.S.C. § 1401(25); 34 C.F.R. § 300.26(a). "Specially-designed instruction means adapting, as appropriate to the needs of an eligible child . . ., the content, methodology, or delivery of instruction. . . ." 34 C.F.R. § 300.26(b)(3). Special education also means "the adjustment of the environmental factors, modification of the course of study and adaptation of teaching methods, materials and techniques to provide educationally for those children who are gifted or disabled to such an extent that they need specially designed instruction in order to receive educational benefit." A.R.S. § 15-761(31). In Arizona, this includes "instructional and assessment adaptations required by the student." A.A.C.R7-2-401(F)(4). Adaptations include both modifications (substantial changes in what a student is expected to learn and to demonstrate) and accommodations (provisions made to allow a student to access and demonstrate learning). A.A.C.R7-2-401(B)(1), (2), and (16). Essentially, special education is *individualized instruction*. *See Rowley*, 458 U.S. at 203-04 ("personalized instruction with sufficient support services").

Respondent School District has been providing Student individualized instruction for the past several years. Respondent School District has waived the homework requirement or lowered its effect on Student's overall grade. Respondent School District placed Student in an alternative setting (environment) with a smaller class size and increased one-on-one instruction. Respondent School District provided Student assistance with study skills and organization. Respondent School District adjusted assignments for Student and adapted his curriculum in Language Arts and Humanities. Respondent School District modified Student's schedule by allowing him to miss the first

class hour. All of these changes provided Student with individualized instruction. They were necessary because Student's educational performance is adversely affected by his disabilities. Student qualifies for special education.

VIII. Remedies

Respondent School District's failure to comply with the child find and notice provisions of the law seriously infringed on Parent's right to understand and participate in the process, denying Student a free appropriate public education and wrongly causing Parent to incur the cost of the March 2000 evaluation. (Petitioner's Exhibit 30.) Reimbursement for that cost, with interest, is appropriate. *See Dept. of Ed., State of Hawaii v. Cari Rae S.*, 158 F.Supp.2d 1190, 1195 (D. Haw. 2001) (allowing reimbursement for costs stemming from child find violations).

Moreover, Student is a child with a disability as defined by the IDEA. Respondent School District must formulate an individualized educational program for Student.

Finally, this tribunal finds that Student is the prevailing party.

ORDER

Based upon the entire record and for the reasons discussed above, the Hearing Officer's Decision is **reversed in part**.

IT IS HEREBY ORDERED that Scottsdale Unified School District shall reimburse Parent $695.00, including interest at the statutory rate accruing from the date the expense was incurred. *See* A.R.S. § 44-1201(A).

IT IS FURTHER ORDERED that Scottsdale Unified School District shall follow the mandates of the IDEA and develop an individualized educational program for Student.

. . .

RIGHT TO SEEK JUDICIAL REVIEW

Pursuant to Arizona Administrative Code (A.A.C.) R7-2-405(22), this Decision and Order is the final decision at the administrative level. Any party aggrieved by the findings and decisions made in a hearing or in an administrative review has the right to judicial review. Any action for judicial review must be filed within 35 days of the date that the Decision and Order was mailed to the parties.

Done this 12th day of February 2003.

OFFICE OF **A**DMINISTRATIVE **H**EARINGS

_____
Eric A. Bryant
Administrative Law Judge

Copy mailed by certified mail (No. _____)
this ___ day of February 2003, to:

Lucy M. Keough
Attorney at Law
7000 N. 16th Street, Suite 120-301
Phoenix, AZ 85020
Attorney for Appellants/Petitioners

Copy mailed by certified mail (No. _____)
this ___ day of February 2003, to:

James R. Martin
LEWIS AND ROCA LLP
40 North Central
Phoenix, AZ 85004-4429
Attorneys for Respondent

. . .

Copies mailed by regular/interdepartmental mail

this ___ day of February 2003, to:

Steven Mishlove, Exceptional Student Services
Arizona Department of Education
ATTN: Theresa Schambach
1535 West Jefferson
Phoenix, AZ 85007

Harold J. Merkow, Due Process Hearing Officer
1102 W. Glendale Ave., #116
Phoenix, AZ 85021

By _____